IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 992 OF 2002

IN

ARBITRATKION PETITION NO. 139 OF 2002

IN

AWARD NO. 1 OF 2002

Oil & Natural Gas Corporation Ltd. ..Appellants
(Org.Petitioners)

Versus

My Construction Co. ..Respondents
(Org.Respondents)

Mr.Rajiv Kumar with Pradeep Bakhru, Virendra Pereira i/b. Divya Shah Associates for the appellants.

Mr. G.Bobde with D'Mello for Respondents.

CORAM: D.K.DESHMUKH &
J.H.BHATIA,JJ.

DATE: 30th October,2007.

P.C.

1. By this Appeal, the appellant challenges the order dated 23rd July, 2002 passed by a learned Single Judge of this Court in Arbitration Petition No. 139 of 2002. That petition was also filed by the present appellant under Section 30 of the Arbitration Act, 1940 raising objection to the arbitration award dated 11.6.2001. That award was made by a learned arbitrator directing the appellant-ONGC to pay certain amount of money to the respondent.

2. There was a contract awarded to the respondent by the appellant-ONGC for construction of a warehousing complex at Uran. On tender being floated by the appellant-ONGC for construction of the warehousing complex at Uran, the respondent submitted its tender in three separate envelopes on 14th March, 1991 as per the terms and conditions of the invitation to tender. Envelope No.1 related to earnest money, envelope No.2 related to Technical and unpriced Commercial Bid and envelope No.3 contained Price Bid. It appears that after the tenders were submitted on 14th March, 1991, there was a bidders' conference held on 12.12.1991. In that conference, certain mistakes in the tender were pointed out. On the mistakes being pointed out, the persons who had submitted the bids, including the

respondent, sought an opportunity to submit a revised price bid. That opportunity was given and revised price bid was submitted on 27.1.1992. The bid submitted by the respondent was ultimately accepted. The work was admittedly completed. Certain disputes arose between the parties. There was an arbitration clause in the contract. The disputes were, therefore, referred to the arbitrator. There were several claims. One claim was compensation on account of escalation in price. The other claim with which we are concerned in this Appeal related to removal of certain hutments put up on the site by encroachers. The respondent had made a claim for escalation which was for Rs.5,55,486.72. The ONGC disputed the claim and contended that certain payments were wrongly made to the contractor and, therefore, ONGC is entitled to claim back those amounts which are overpaid by ONGC to the contractor on account of escalation. Counter-claim of ONGC is for Rs.25,29,923.49. The dispute between the parties was as to what is the date with reference to which the escalation in price is to be considered. According to the contractor, the date of submission of tender was 14th March, 1991 and, therefore, escalation is to be considered with reference to that date. According to ONGC, however, for the purpose of considering escalation in the price, the relevant date is 27.1.1992 when the revised price bid was submitted. The learned arbitrator

accepted the case of the respondent and held that for the purpose of clause 10 C(1) of the contract between the parties, the relevant date is 14th March, 1991 and awarded Rs.5,55,486.72 to the contractor-respondent and also rejected the counter-claim made by ONGC. The other claim with which we are concerned is that the contractor-respodnent claimed that he was required to pay certain sum for removal of encroachment on the land and that it is entitled to reimbursement of that amount from ONGC. That claim was disputed by ONGC. According to ONGC, firstly, removal of encroachment was the responsibility of respondent and therefore ONGC was not liable to make any payment. It is also the case of ONgC that there is no term in the contract which makes ONGC liable to pay any amount to the respondent on this count. The learned arbitrator by the award has directed ONGC to make payment of the amount on account of escalation as also on account of removal of hutments.

3. Arbitration Petition No.139 of 2002 was filed challenging the award on three grounds apart from the above-referred two grounds. One more ground on which the award was challenged was the rate at which interest has been awarded. The learned Single Judge rejected the contention of the ONGC on the aforesaid two grounds, but in part accepted the contention in relation to interest and modified the award accordingly. It is this order

passed by the learned Single Judge and the award of the arbitrator which are challenged in the present Appeal.

4. The learned Counsel appearing for the appellant submits that the learned arbitrator himself has observed in the award that in order to consider the date on which tender is submitted, three things are to be considered (1) when the earnest money bid is given, (2) when the technical and unpriced commercial bid given and (3) when the price bid is given. The learned arbitrator has held that when all these three things are done, submission of the tender is complete. The learned Counsel submits that in all these cases though the price bid was also submitted on 14th March, 1991, in the conference held on 12.12.1991, it was found that there were mistakes in the tender and therefore an opportunity was sought by the tenderers to submit their revised price bid. That opportunity was given and revised price bid was submitted in January, 1992. According to the learned Counsel, therefore, the tender will be taken to have been submitted only on 27.1.1992.

5. The learned Counsel appearing for the respondent, on the other hand, submits that the mistakes that were found in the tender were marginal and, therefore, the changes that were made in the revised bid

were also not significant. According to him, therefore, the date of submission of the price bid is of March 1991 and not of January, 1992. The learned Counsel for the respondent took us through the award. He also took us through the minutes of the bidders' conference. He submits that the prices on the basis of which the bid was submitted were of March 1991 and not of January, 1992 and therefore, the arbitrator has rightly rejected the contention that the relevant date is 14th March, 1991. The learned Counsel also submits that the finding recorded by the learned arbitrator is a finding within his jurisdiction and therefore we should not interfere with that finding. Insofar as the removal of hutments is concerned, the learned Counsel appearing for ONGC submits that it is clear from the parawise comments dated 16th March 1991 that it was made absolutely clear in the tender that removal of encroachment on the site will not be the responsibility of ONGC. According to him, therefore, ONGC is not liable to reimburse anything to the respondent. He further submits that in any case, unless there is a term in the contract which entitles the contractor to claim reimbursement on account of removal of encroachment the learned arbitrator, who is creation of the agreemment, could not have made award in favour of the respondent on this count. The learned Counsel for the respondent, on the other hand, submits that though it is true that there is no specific term in

the contract which makes the contractor entitled to reimbursement of the expenditure incurred by him for removal of encroachment, according to him, it is clear from the contract and correspondence exchanged between the parties that removal of encroachment of hutments was the responsibility of ONGC and,therefore, it is the ONGC which is liable to reimburse the respondent for the expenditure incurred by it in this regard. He further submits that there is no dispute that in fact the contractor has paid a sum of Rs.13 lakhs to the encroachers for removing the hutments and therefore, according to him, ONGC could not have denied this liability to make good the amounts that were spent by the respondent on this count.

6. Now in the light of these rival submissions if the record is perused, it becomes clear that so far as the amount claimed on account of escalation is concerned, clause 10 C(1) of the contract is relevant. It reads as under :-

> "If after submission of tender and/or during the progress of work, the indices for the labour and material (other than cement) and price of diesel used in the works get increased and as consequence thereof, the contractor has to pay an increased price, he shall be entitled for

payment of such increase. x x x x "

Perusal of the above clause shows that for the purpose of this clause, what is relevant is the date of submission of the tender. Perusal of the award shows that the learned arbitrator himself has observed "As I have pointed out earlier, the tender required to be submitted was to consist of three different parts viz., (i) the earnest money, (ii) technical and un-priced commercial bid and (iii) the price bid. When all these three are submitted, they constitute the tender which is submitted." Now we have to see as to when these three bids can be said to have been complete. It is an admitted position that three envelopes (i) containing earnest money, (ii) technical and un-priced commercial bid and (iii) the price bid were submitted on 14.3.1991. Perusal of the minutes of the conference of the tenderers dated 12.12.1991 shows that certain mistakes were found in the offer document and therefore, the tenderers themselves sought an opportunity to submit a revised price bid. That opportunity was given to them. It is nobody’s case that there were any guidelines laid down or any restrictions placed as to the extent to which the revision of the price bid can be made by the contractor and it is thereafter that the revised price bid was submitted on 27.1.1992 and it is this revised price bid not the price bid which was submitted on

14.3.1991 which was considered by ONGC for acceptance. In our opinion, therefore, as the price bid which was considered and could have been considered for acceptance by ONGC was submitted only on 27.1.1992 all the three things which, according to the learned arbitrator, are necessary for constituting the submission of tender can be said to have been completed only on 27.1.1992 and not on 14.3.1991 and therefore the learned arbitrator committed an error in holding that the date of submission of tender for the purpose of clause 10 C(1) is 13.3.1991. In our opinion, the second aspect that is relevant is that clause 10 contains an escalation cause. The escalation clause has reference to the price on the basis of which offer is submitted. When the contractor is given an opportunity to submit a revised offer and that revised offer is being submitted after a gap of about 9 months, then it is obvious that the contractor who submits the revised offer would consider the prices that are prevalent on the date on which he was revising the offer. Whether a the contractor in fact revised the offer considering the prices prevailing on that date in our opinion would not be relevant. What would be relevant is that the contractor was given an opportunity to take the prices into consideration that were prevailing at the timer when he submitted the revised offer and therefore, in our opinion, as clause 10C the escalation clause has nexus with the price and as price

bid as submitted admittedly on 21.1.1992, the only date with which clause 10C will have nexus is 27.1.1992 and no other date. In our opinion, therefore, the finding recorded by the learned arbitrator on this count has an error apparent on the face of the record. Therefore, that finding has to be set aside. As a consequence of setting aside this finding, as observed by the learned arbitrator himself, the counter-claim made by the ONGC will also have to be allowed because that counter-claim consists of over-payment made by ONGC by way of escalation charges on the footing that the relevant date was 14.3.1991.

7. This takes us to the second ground on which the award is challenged, viz. reimbursement to be made to the contractor for removal of hutment. Admittedly, there is no clause in the contract which states that ONGC will reimburse the contractor the expenses incurred by the contractor for removal of encroachments. There was dispute between the parties as to whose responsibility it is to remove encroachments. In our opinion, what was stated in parawise comments made by ONGC on 16th March, 1991 which are quoted in para 23 of the award of the learned arbitrator is relevant. Those comments make it clear that the tenderers were clearly informed that there are certain huts on the premises and that ONGC does not take any responsibility for removal

those huts. Obviously, therefore, removal of huts was the responsibility of the contractor. In any case, even it is assumed for the sake of argument that it was the responsibility of ONGC the correspondence to which our attention was invited by the learned Counsel shows that ONGC consistently was saying that they are not liable to pay anything to the contractor on account of removal of hutments. In our opinion, therefore, the major flaw in the award of the learned arbitrator is that he directed ONGC to reimburse the contractor for money spent by it for removal of hutments when admittedly, there is no term in the contract which obliges the ONGC to reimburse the contractor for any expenditure that it may have incurred for removal of hutments. The arbitrator is a creation of the agreement between the parties and his jurisdiction is limited to what is provided specifically in the contract. He cannot create a contract and he cannot make an award only because he finds that it is equitable to do so or he finds that the contractor has really spent the money. In our opinion, therefore, in absence of specific term in the contract, the arbitrator could not have made the award directing ONGC to reimburse contractor for the expenditure alleged to have been incurred by it for removal of hutments.

8. In the result, the Appeal succeeds and is allowed. The award made by the arbitrator awarding

Rs.5,55,486.72 to the respondent on account of escalation is set aside. The award made by the learned arbitrator directing ONGC to pay an amount of Rs.12,21,436/- on account of expenditure incurred for removal of hutments is set aside. The counter-claim made by ONGC is granted. The respondent is directed to pay an amount of Rs.25,29,923.49 to ONGC with interest at 14% per annum from the date of reference i.e. 14.1.1995 till the date of realisation.

9. The amount that may have been deposited by ONGC in this Court to the credit of this Appeal may be permitted to be withdrawn by ONGC after eight weeks from today.

Appeal is disposed of. No order as to costs.

10. At the request of the learned Counsel for the respondent, operation of this order is stayed for a period of eight weeks from today.

(D.K.DESHMUKH,J.)

(J.H.BHATIA,J.)